No. 11,145

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE SAINT PAUL MERCURY-INDEMNITY COMPANY OF SAINT PAUL, a Delaware Corporation of Saint Paul, Minnesota, and LIVERMORE WINERY, INCORPORATED, a California Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

ISSUES INVOLVED.

It is apparent from the reply brief for appellee that, in general, there is an agreement between the parties to this action as to the statutes involved, but that the parties do not agree entirely as to the facts, nor proof of such facts, nor the construction and application of the statutes involved in relation to the facts admitted or those found by the District Court below.

AGREED FACTS.

The complaint (R. 2-22) sets forth certain allegations, some of which are admitted in the amended answer to the complaint (R. 22-33), as to the applicable statutes and jurisdiction of the District Court.

However, other allegations of the complaint, including allegations of the removal of the distilled spirits from the distillery premises, and that any tax levied and assessed thereby became due and payable, or that such levy and assessment was in compliance with law, or that defendants were notified and demand for payment was made or was given, are all denied by defendants.

In this connection, a "Statement of the Case" is contained in the opening brief of appellants (pages 3-12), and the issues involved are stated therein. (pages 12-13.)

Appellants are aware of the decisions that the determination of the facts by a lower Court, where there is a conflict in evidence legally admitted, will be upheld on an appeal.

However, appellants submit that this situation does not exist in the present case.

STATUTES INVOLVED.

Reference is made to the transcript, appellants' opening brief, brief for the United States, Appendix (pages i-vi) and the Appendix infra (pages i-vii) for the pertinent statutes applicable to this case.

ISSUES PRESENTED.

It is the position of appellants that there was no evidence, legally admitted by the District Court, presented upon which the District Court could make a determination of the alleged facts set forth in the complaint.

Consequently, appellee failed to establish a cause of action within the purview of applicable statutes and decisions; hence, defendants were entitled to a judgment dismissing the instant action by the District Court.

Further, that assuming, but not granting, that a *prima facie* case was properly and legally presented by appellee, that appellee failed to sustain the burden of proof by the introduction of evidence controverting the issues raised by appellants establishing that there had not been a compliance with the applicable statutes as to the levy and assessment of the taxes involved or notices or demands given in accordance therewith, as required by statute and applicable decisions discussed hereafter.

Moreover, appellants contend that even if there was sufficient evidence, legally admitted before the District Court, from which that Court could and did make a determination of the facts, that such evidence established clearly that the loss of brandy resulted from a *"casualty"* and not from the negligence of the *"owner"*; hence, appellants were entitled to abatement of the tax and judgment under the applicable statutes making such abatement or remission of tax mandatory.

ARGUMENT.

I.

BURDEN OF PROOF WAS UPON APPELLEE TO ESTABLISH FACTS ALLEGED IN THE COMPLAINT.

Reference is made to the opening brief for appellants and to the authorities cited therein in support of this statement.

In addition, it is conceded that in the event a certificate of assessment is legally and properly admitted in evidence, that such certificate of assessment creates a *prima facie* case of liability to the tax. (*United States v. Rindskopf,* 105 U.S. 418-422, 26 L. Ed. 1131.)

Appellants contend that such *prima facie* case was never made or established because the only evidence of the certificate of assessment was an asserted photostatic copy of but a portion of an unauthenticated assessment roll, which was improperly, and, over the objection of appellants, admitted in evidence.

Under revised statutes, Section 882 (as amended by Sec. 6 of the Act of June 19, 1934, c. 653, 48 Stat. 1109) referred to on pages i and ii of the Appendix in the reply brief of appellee, only a "*copy*" of a record, paper or other document of an executive department of the United States shall be admitted in evidence when duly authenticated under the seal of such department; although any book or record of account, *in whatever form,* and minutes (or portions thereof) of proceedings, of any such executive department are admissible as evidence of any act, transaction, occurrence or event.

COPY OFFERED NOT A TRUE COPY.

It should be noted that the purported copy of the assessment certificate (Plaintiff's Exhibit 5) was and is not a true and correct copy of said purported original certificate of assessment, in that said certificate contained therein and included thereon, penciled notations and memoranda on that portion of the certificate of assessment covered by the purported certified copy thereof, which was not included therein or thereon; also, that the original certificate of assessment contained many other items deemed to be relevant by appellants if properly admitted in evidence as to which an inquiry would have been made if properly admitted in evidence.

NO FOUNDATION LAID.

Moreover, appellants contend that the proper foundation was not laid, prior to the admission in evidence, of Plaintiff's Exhibit 6, as required under the above statute, to establish that the certificate of assessment was a book or record of account or minutes authenticated under the seal of the Treasury Department.

EXHIBIT 6 NOT IN EVIDENCE.

Further, reference is made to the transcript (R. 70-72) wherein appellee offered in evidence the purported original certificate of assessment and asked permission to withdraw it for the purpose of furnishing a photostatic copy to the appellants (defendants), which offer in evidence was objected to and not decided by the Court, whereupon appellee offered the

asserted certified copy of the certificate, which the Court stated (R. 72) "The Court: I will allow *it* to go in subject to your motion to strike and over your objection." Then immediately following this statement, the reporter included in the transcript (R. 72) the following notation "(The certified copy of assessment certificate is marked plaintiff's Exhibit 5 in evidence.)" which appears to be solely a deduction of the reporter that the original certificate of assessment was introduced in evidence over the objection made without a ruling thereon by the Court, as the Court said "it", rather than "they" would be admitted over the objection in connection with the tender of the alleged certified copy.

Consequently, appellants contend that Plaintiff's Exhibit 6 was not admitted in evidence, hence was not before the Court, and cannot be considered as evidence herein; also, that the exhibit in the form offered was not legally admissible under the above statute.

II.

BURDEN OF PROOF NOT SUSTAINED BY APPELLEE.

Assuming, but not granting, that Plaintiff's Exhibits 5 and 6 were properly admitted in evidence, appellee failed to sustain the burden of proof that the tax was levied and assessed and notice and demand therefor made in the form and manner provided by law and under the statutes applicable thereto.

Moreover, appellee thereupon proceeded promptly to disprove its assumed "*prima facie*" case by showing that the assessment was made improperly and not based upon the actual quantity of brandy distilled or lost in the distillery premises. (Opening Brief for Appellants, pp. 38-41.)

As pointed out in the opening brief for appellants (pp. 38-40) appellee's witness contradicted himself as to the proof and quantity of the brandy, and admitted (R. 117), that he had not included in his computation any distilling material or brandy which might have been contained in the overflow tank No. 1 having capacity of 398.34 gallons, the so-called overflow tank having a capacity of 180 gallons and the singling tank having a capacity of 104 gallons; also (R. 119) that he had not made a test to determine whether or not there was any brandy in the liquid on the floor; or that there was any distilled material removed from the distillery premises, as no test to determine the same had been made. In spite of the fact that this witness indicated he was an expert and familiar with the premises, the manager of the corporation at the time testified positively as to the presence of these tanks on the premises and the fact that distilling material was contained therein. (R. 170 et seq.) Later this same witness for appellee admitted that he was not familiar with the winery and distillery (R. 127) and that it was no more than the second time that he had visited the premises so that his testimony was based on general knowledge of stills,

rather than a particular knowledge of the Livermore winery still.

In view of this conflict in the testimony of this particular witness and in order to establish the presence of the faucet installed upon the distilling material line in violation of law (26 U.S.C.A. Secs. 2816, 2832), and without the knowledge of defendant owner of the installation of said faucet, referred to in paragraph VI of defendant's amended answer, the Court erroneously, in the opinion of appellants, refused to require the production of the plans by said witness (R. 129) to establish one of the facts in controversy and to impeach the testimony of this witness.

Moreover, this particular fact became important in establishing that the loss of the brandy was not due to the negligence of defendant owner, but rather was occasioned by an act of an employee that did not occur within the course and scope of his employment with the knowledge and consent of defendant owner.

Further, as pointed out in the opening brief for appellants (p. 39), Plaintiff's Exhibit 5 purports to be a demand for payment of taxes for a loss occurring on December 26, 1936, whereas the assessment certificate, Plaintiff's Exhibit 1 (R. 10-13) shows the assessment of a tax for a loss on two days, namely, December 26 and 27, 1936, and the evidence of such loss according to appellee's witness related to but a partial test and report made by him on December 28, 1936.

As pointed out in *United States v. Rindskopf,* 105 U.S. 418, the Court finds as follows:

> "The assessment of the Commissioner of Internal Revenue was only *prima facie* evidence of the amount due as taxes upon the spirits distilled between the dates mentioned. It established a *prima facie* case of liability against the distiller, and nothing more. If not impeached, it was sufficient to justify a recovery; *but every material fact upon which his liability was asserted was open to contestation. The distiller and his sureties were at liberty to show that no spirits, or a less quantity than that stated by the Commissioner, were distilled within the period mentioned, and thus entirely, or in part, overthrow the assessment.* They were also at liberty to show a payment of the tax assessed, in whole or in part, and thus discharge or reduce the distiller's liability. To the extent, however, in which the assessment was not impaired, it was evidence of the amount due. The court, therefore, erred in instructing the jury that the assessment was to be taken and considered in its entirety, and that the Government was entitled to recover the exact amount assessed or not any sum. In other respects, the charge as given above correctly presents the law.
>
> *There may, undoubtedly, be cases where an assessment must stand as an entirety or not at all;* as, where an erroneous rate has been adopted by the officer; *or where it is impossible to separate from the property assessed, the part which is exempt from the tax;* or where its validity depends upon the jurisdiction of the commissioner. The present case does not fall within either of these classes. Here the question is as to the

quantity of spirits produced on which taxes were not paid."

Hence, had appellee properly established a *prima facie* case, with the proper introduction in evidence of the certificate of assessment, it was the duty of appellee to go forward with the proof and sustain the allegations of the complaint, by refutation of the evidence introduced by defendants, which appellee failed to do.

As in *United States v. Rindskopf,* the question presented in this case is as to the quantity of spirits produced on which taxes were not paid. It is submitted that in this case, the issue is as to whether the assessment must stand as an entirety or not at all. Having failed to establish a proper assessment or the quantity or proof of spirits distilled, or lost, or on which no tax had been paid already, appellee failed to sustain the burden of proof.

In the case of *Freeman v. United States,* 157 Fed. 195, cited by appellants but not referred to by appellee, where a comparable situation arose, the court stated at page 197, as follows:

> "The government seeks to obtain a judgment against the distiller and his surety, and invokes the aid of the United States court for that purpose. It institutes a suit upon a bond which was executed by the distiller and his surety for the payment of any taxes that might be due by the distiller; and while the execution of the bond by the distiller and his surety is admitted, *never-*

theless it is still incumbent on the government to show that the distiller is indebted to the government for the amount claimed to be due for taxes on distilled spirits. Thus we have a well-defined issue as to whether the distiller is indebted to the government for taxes on distilled spirits. However, it is insisted by counsel for the government that the court is powerless to hear any evidence which the defendants may offer in relation to the issue thus raised. *The distiller and his surety contend that the distiller is not indebted to the government, and in support of such contention it is averred that the spirits deposited in the warehouse were accidentally destroyed by fire, without any fraud, collusion, or negligence of the defendants. This is as complete a defense to the action, when proven or admitted, as the plea of payment could possibly be when proven or admitted. The statute expressly provides that no tax on spirits destroyed in this matter shall be collected.* To hold that the distiller and his surety under such circumstances would not be entitled to assert a right thus conferred as a defense to such an action would be in utter disregard of the rights of the defendants below and would deprive them of their property without due process of law, as well as to deny them the equal protection of the laws.

It is admitted by counsel for the government that the spirits in question were accidentally destroyed by fire without any fraud, collusion, or negligence of the plaintiffs in error, and that the law (Act March 1, 1879) provides that no tax shall be collected on such spirits so destroyed, but it is insisted that notwithstanding that the plain-

tiffs in error are by law invested with the right thus conferred, that the court is powerless to afford a remedy. We cannot see our way clear to give our assent to this construction of the statute. * * *

* * * Were it not for the act of Congress authorizing the establishment of bonded warehouses, and the provision that the distiller should have eight years in which to pay the taxes on spirits duly deposited therein, as in this instance, the taxes would at once become due and payable. However, Congress has in its wisdom seen fit to afford this extension of time to distillers, and one who becomes surety under such circumstances sustains the same relation to the government that a surety would to an individual when he undertakes to answer for the default or miscarriage of another, and were it not for the provisions contained in section 3221 of the Revised Statutes (U. S. Comp. St. 1901, p. 2087) the surety would be liable for the full amount of the undertaking, notwithstanding any accident of casualty which might befall his principal in the meantime. The basis of the right of the government to recover against the surety depends upon its ability to show that it is entitled to recover the amount alleged to be due against the principal. The government has, in this instance, sought to collect the amount of taxes alleged to be due in a court of law, and in order to do so has instituted proceedings for that purpose. Under these circumstances it would be unprecedented to hold that, notwithstanding certain rights were conferred upon the distiller by the provisions of the statute, yet the surety, when sued on his joint

obligation with the distiller, should not be entitled to assert this right as a defense to the action instituted against him. In the case of the United States v. Bank of America (C.C.) 15 Fed. 730, among other things, it is said:

> While under the revenue laws taxes are due the government by the distiller on distilled *spirits as soon as the same are produced, and there is ample machinery for collecting the same by warrant of distraint without the government being required to secure a judgment against the distiller,* yet this provision of the law only applies to the distiller in cases where the spirits *have not been placed in a bonded warehouse* as hereinbefore stated; but before the government can collect any taxes from the surety that might be due by the distiller it must first obtain a judgment against the distiller as well as the surety, and when an action is instituted for that purpose it necessarily raises an issue as to whether *the distiller is due the government anything,* and this issue must be determined in favor of the government before a judgment can be obtained against either."

NOTICES AND DEMAND FOR TAXES.

Moreover, a witness for appellee admitted (R. 76) that "there is no office copy of notices and demands for taxes"; also, that just the original copy is prepared; hence, it was error to admit in evidence any purported copy of such notice, there having been no prior demand, as required under California Code of Civil Procedure (Secs. 1855, 1937, 1938 et seq.) made upon appellants to produce the notice. (See Appellants' Opening Brief, page 37.)

THE LOSS RESULTED FROM A CASUALTY AND NOT FROM NEGLIGENCE.

Appellants refer to paragraph III of their opening brief, pages 18-34 inclusive, wherein are set forth the authorities, relied upon by appellants, to the effect that revenue and tax statutes must be construed strictly as to the government and liberally in favor of taxpayers based upon language read in its ordinary and natural sense.

No admissible evidence was offered by appellee that was part of the *res gestae* (Appellants' Opening Brief, page 42) to establish that the alleged loss was occasioned by the negligence of the owner of the distilled spirits, rather than from a casualty, although the term *"casualty"* is used in several of the exhibits introduced in evidence and relied upon by appellee, indicating that appellee recognized the loss was due to a "casualty", rather than from any negligence of defendant owner.

In view of the decision in *Freeman v. United States,* supra, and the denial contained in the amended answer of defendants that they are indebted to appellee, the burden of proving that the loss was occasioned by the negligence of the owner was upon the appellee, rather than upon appellants. Had appellants instituted an action to abate or recover a tax assessed or paid, then the burden of proof would have been upon appellants, which is not the situation or rule of law in the instant case. (See: *Western Express Co. v. United States,* 141 F. 28; *Clifford v. Rothensies,* 46 F. Supp. 782.)

Appellee had the right to recover any taxes due by distraint, or to levy and assess the taxes based upon the quantity of distilling material used in the distillery (Title 26 U.S.C.A. Sec. 2641) but chose to follow the present course of procedure, *thereby changing the order and burden of proof and placing the same squarely upon the shoulders of appellee,* which burden of proof in view of the evidence, is clearly not sustained.

None of the cases cited in the reply brief for appellee are applicable to the present situation or the facts properly adduced from the evidence legally admitted, in that in such cases a "removal" of the distilled spirits from the distillery premises was established by the evidence or admitted. The evidence in this case is to the contrary. In *Rogan v. Conterno,* 132 F. (2d) 726, the distilled spirits had already been removed from the distillery and had been used in the fortification of wine so that an entirely different statute applied in relation thereto. In that case, the statute provided for the payment of the tax when the wine was *sold* or *removed* for *consumption* or *sale.* It was not necessary to remove the wine at all in order for the tax to become payable. Further the "consumption" by fire came within the provisions of the statute, whereas in this case, as no "removal" of the distilled spirits was established by the evidence, any tax which may have previously attached did not become due and payable until removal, which *"removal"* was not established; rather, was shown not to have occurred.

In the *Seagram* cases, cited by appellee on page 11 of their reply brief, there had not only been a removal from the distillery to the cistern room but there had also been a process of manufacture that had occurred after such removal, and the loss of spirits occurred when such manufactured product was being returned to the distillery.

There is set forth in the Appendix, *infra,* certain statutes which indicate clearly the intention of Congress in relation to the applicable statutes in the instant case and the decisions thereunder, wherein the Commissioner of Internal Revenue is authorized and required to abate any tax under regulations approved by the Secretary of the Treasury on the occasion of the loss of any distilled spirits so long as they are not stolen or destroyed and such loss did not result from leakage or evaporation while on the premises of a registered distillery during or after removal to a bonded government warehouse. The distilled spirits lost were intended to be used in the fortification of wine in the adjoining winery premises of defendant winery, and as the tax rate of 10 cents per gallon of distilled spirits would, upon such fortification, become applicable, rather than the rate of $2.00 per gallon, it is apparent that a most inequitable result will occur by the imposition of a tax upon defendants at the higher, rather than the lower rate.

In order to support the conclusion of appellee that any loss of brandy resulted from negligence, and not from a casualty, (so as to impute the negligence of an

employee to a corporation), it is necessary to impute the *commission of a crime* to the owner, which imputation is not authorized under the statutes or decisions noted by appellee. (See Title 26 U.S.C.A. sec. 2818.)

CONCLUSION.

As appellee failed to sustain the burden of proof to establish the facts alleged in their complaint, denied and controverted by the pleadings and the evidence, and as reversible error has been committed, for the reasons and upon the grounds set forth in the opening brief for appellants, it is submitted that there was no evidence introduced or legally admitted, to support the findings and the judgment of the lower Court; hence, such judgment should be reversed with instructions to the lower Court to enter a judgment in favor of defendants in conformity with the evidence and the law applicable to the case.

Dated, San Francisco,
April 19, 1946.

Respectfully submitted,
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HANS A. KRUGER,
ROBERT A. WERTSCH,
Attorneys for Appellants.

(Appendix Follows.)

Appendix

United States Code Annotated, Title 26.

SEC. 2816. Plan of distillery.

(a) Requirements. Except as provided in section 2824 (a) every distiller and person intending to engage in the business of a distiller shall, previous to the approval of his bond, cause to be made, under the direction of the collector of the district, an accurate plan and description, in triplicate, of the distillery and distilling apparatus, distinctly showing the location of every still, boiler, doubler, worm tub, and receiving cistern, the course and construction of all fixed pipes used or to be used in the distillery, and of every branch and every cock or joint thereof, and of every valve therein, together with every place, vessel, tub, or utensil from and to which any such pipe leads, or with which it communicates; also the number and location and cubic contents of every still, mash tub, and fermenting tub, the cubic contents of every receiving cistern, and the color of each fixed pipe, as required in this chapter. One copy of said plan and description shall be kept displayed in some conspicuous place in the distillery, and two copies shall be furnished to the collector of the district, one of which shall be kept by him, and the other transmitted to the Commissioner. The accuracy of every such plan and description shall be verified by the collector, the draftsman, and the distiller; *and no alteration shall be made in such distillery without the consent, in*

writing, of the collector. Any alteration so made shall be shown on the original, or by a supplemental plan and description, and a reference thereto noted on the original, as the collector may direct; and any supplemental plan and description shall be executed and preserved in the same manner as the original.

SEC. 2818. Notice of manufacture of and permit to set up still.

(a) Requirement. Any person who manufactures any still, boiler, or other vessel to be used for the purpose of distilling, shall, before the same is removed from the place of manufacture, notify in writing the collector of the district in which such still, boiler, or other vessel is to be used or set up, by whom it is to be used, its capacity, and the time when the same is to be removed from the place of manufacture; and no such still, boiler, or other vessel shall be set up without the permit in writing of the said collector for that purpose; and

(b) Penalty for setting up still without permit. Any person who sets up any such still, boiler, or other vessel, without first obtaining a permit from the said collector of the district in which such still, boiler, or other vessel is intended to be used, or who fails to give such notice, shall pay in either case the sum of $500.00, and shall forfeit the distilling apparatus thus removed or set up in violation of law.

SEC. 2846. Assessment for deficiencies in production and excess of material used.

(a) Power of commissioner. On the receipt of the distiller's return in each month, the Commissioner shall inquire and determine whether the distiller has accounted for all the grain or molasses used, and all the spirits produced by him in the preceding month. If he is satisfied that the distiller has reported all the spirits produced by him, and the quantity so reported is found to be less than 80 per centum of the producing capacity of the distillery as estimated according to law, he shall make an assessment for such deficiency at the rate of tax imposed by law for every proof gallon. In determining the quantity of grain used, fifty-six pounds shall be accounted as a bushel; and if the Commissioner finds that the distiller has used any grain or molasses in excess of the capacity of his distillery as estimated according to law, he shall make an assessment against the distiller at the rate imposed by law for every proof gallon of spirits that should have been produced from the grain or molasses so used in excess, which assessment shall be made whether the quantity of spirits reported is equal to or exceeds 80 per centum of the producing capacity of the distillery. If the Commissioner finds that the distiller has not accounted for all the spirits produced by him, he shall, from all the evidence he can obtain. determine what quantity of spirits was actually produced by such distiller, and an assessment shall be made for the difference between the quantity reported and the quantity shown to have been actually produced, at the rate of tax imposed by law for every proof gallon: *Provided*, That the actual product shall

be assumed to be in no case less than 80 per centum of the producing capacity of the distillery as estimated according to law. All assessments made under this section shall be a lien on all distilled spirits on the distillery premises, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the tract of land whereon the said distillery is located, and any building thereon, from the time such assessment is made until the same shall have been paid.

SEC. 2901. Loss Allowances.

(b) Accidental fire or other casualty. The Secretary, upon the production to him of satisfactory proof of the actual destruction by accidental fire or other casualty, and without any fraud, collusion, or negligence of the owner thereof, of any distilled spirits, while the same remained in the custody of any officer of internal revenue in any internal revenue bonded warehouse or of any grape brandy withdrawn for use in the fortification of sweet wines and destroyed prior to such use while stored in the fortifying room on the winery premises, and before the tax thereon has been paid, may abate the amount of internal revenue taxes accruing thereon, and may cancel any warehouse bond, or enter satisfaction thereon, in whole or in part, as the case may be. And if such taxes have been collected since the destruction of said spirits or grape brandy, the said Secretary shall refund the same to the owners thereof out of any moneys in the Treasury not otherwise appropriated. And when any distilled spirits are destroyed by accidental fire or other casualty, without any fraud, collusion, or negligence

of the owner thereof, after the time when the same should have been drawn off by the storekeeper-gauger and placed in the internal revenue bonded warehouse provided by law, no tax shall be collected on such spirits so destroyed, or, if collected, it shall be refunded upon the production of satisfactory proof that the spirits were destroyed as herein specified. When the owners of distilled spirits or grape brandy in the cases provided for by this section may be indemnified against such tax by a valid claim of insurance, for a sum greater than the actual value of the distilled spirits or grape brandy before and without the tax being paid, the tax shall not be remitted to the extent of such insurance.

SEC. 3031. Tax on brandy or spirits used in fortification.

(a) Rate and application of tax. Under such regulations and official supervision and upon the giving of such notices and entries as the Commissioner, with the approval of the Secretary, may prescribe, any producer of wines defined under the provisions of this subchapter may withdraw from any fruit distillery or internal revenue bonded warehouse grape brandy, or wine spirits, for the fortification of such wines on the premises where actually made, and any producer of citrus-fruit wines, peach wines, cherry wines, berry wines, apricot wines, prune wines, plum wines, pear wines, or apple wines may similarly withdraw citrus-fruit brandy, peach brandy, cherry brandy, berry brandy, apricot brandy, prune brandy, plum brandy, pear brandy, or apple brandy for the

fortification, respectively, of citrus-fruit wines, peach wines, cherry wines, berry wines, apricot wines, prune wines, plum wines, pear wines, or apple wines, on the premises where actually made: *Provided,* That after June 26, 1936, there shall be levied and assessed against the producer of such wines or citrus-fruit wines, peach wines, cherry wines, berry wines, apricot wines, prune wines, plum wines, pear wines, or apple wines (in lieu of the internal-revenue tax now imposed thereon by law) a tax of 10 cents per proof-gallon of grape brandy, citrus-fruit brandy, peach brandy, cherry brandy, berry brandy, apricot brandy, prune brandy, plum brandy, pear brandy, apple brandy or wine spirits, whenever withdrawn and so used by him after such date in the fortification of such wines or citrus-fruit wines or peach wines, cherry wines, berry wines, apricot wines, prune wines, plum wines, pear wines or apple wines during the preceding month, which assessment shall be paid by him within eighteen months from the date of notice thereof: *Provided,* That every producer of wine who withdraws such brandy, citrus-fruit brandy, peach brandy, cherry brandy, berry brandy, apple brandy, or wine spirits shall give bond to fully cover at all times prior to payment of the assessment the amount of tax due on such brandy, citrus-fruit brandy, peach brandy, cherry brandy, berry brandy, apricot brandy, prune brandy, plum brandy, pear brandy, apple brandy, or wine spirits, which bond shall be in such form as the Commissioner, with the approval of the Secretary, shall, by regulations, prescribe. When such wines are

destroyed or sold or removed for the manufacture of vinegar, or the production of dealcoholized wines containing less than one-half of 1 per centum of alcohol by volume, the tax under this section as such grape brandy, citrus-fruit brandy, peach brandy, cherry brandy, berry brandy, apricot brandy, prune brandy, plum brandy, pear brandy, apple brandy, or wine spirits shall, under such regulations as the Secretary may prescribe, be abated or refunded.

Nothing contained in this section shall be construed as exempting any wines, citrus-fruit wines, peach wines, cherry wines, berry wines, apricot wines, prune wines, plum wines, pear wines, apple wines, cordials, liqueurs, or similar compounds from the payment of any tax provided for in this subchapter.

Any such wines, or citrus-fruit wines, or peach wines, cherry wines, berry wines, apricot wines, prune wines, plum wines, pear wines, apple wines, may, under such regulations as the Secretary may prescribe, be sold or removed tax free for the manufacture of vinegar, or for the production of dealcoholized wines containing less than one-half of 1 per centum of alcohol by volume.

The taxes imposed by this section shall not apply to dealcoholized wines containing less than one-half of 1 per centum of alcohol by volume.

(b) Loss Allowances.

(1) Leakage, evaporation, etc. The Commissioner, under rules and regulations to be by him prescribed with the approval of the Secretary, upon the presen-

tation of proof to his satisfaction of the loss by leakage, evaporation, theft, or otherwise of brandy or fruit spirits, intended for the fortification of wine, from storage tanks in bonded warehouses or from steel drums filled therefrom while such drums are in such warehouse, and in the fortification room of a bonded winery, not occurring as the result of any negligence, connivance, collusion, or fraud on the part of the winemaker or his agents, is hereby authorized to remit or refund the taxes assessed or paid upon such lost brandy or fruit spirits: *Provided, however,* That such remission or refund shall be allowed only to the extent that the distiller or winemaker is not indemnified or recompensed for such loss.

SEC. 3032(a). Fortification of wines.

(a) Pure sweet wines. Any producer of pure sweet wines may use in the preparation of such sweet wines, under such regulations and after the filing of such notices and bonds, together with the keeping of such records and the rendition of such reports as to materials and products as the Commissioner, with the approval of the Secretary, may prescribe, wine spirits produced by any duly authorized distiller, and the Commissioner, in determining the liability of any distiller of wine spirits to assessment under Section 2846, is authorized to allow such distiller credit in his computations for the wine spirits withdrawn to be used in fortifying sweet wines under this chapter.